No. 18545

United States
COURT OF APPEALS
for the Ninth Circuit

ALBINA ENGINE AND MACHINE WORKS,
an Oregon corporation, and
FIREMAN'S FUND INSURANCE COMPANY,
a California corporation,

Appellants,

v.

J. J. O'LEARY, Deputy Commissioner,
Bureau of Employees' Compensation,
Department of Labor, and HILDA O'BRIEN,

Appellees.

APPELLANT'S BRIEF

Appeal from the United States District Court
for the District of Oregon

GRAY, FREDERICKSON & HEATH,
LLOYD W. WEISENSEE,
1005 Equitable Building, Portland 4, Oregon,
Proctors for Appellants.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 7-63

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JURISDICTION

Appellants seek review of an award of widow's benefits to appellee Hilda O'Brien (hereinafter "claimant") by appellee J. J. O'Leary, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C.A. § 901 *et seq.*

This is a civil suit in admiralty commenced by a Libel in Personam to review the compensation order of appellee J. J. O'Leary awarding widow's benefits. The compensation order was made and entered the 14th day of August, 1962; suit was filed the 11th day of September, 1962 (Tr. 12). The District Court had jurisdiction by virtue of 33 U.S.C.A. § 921 (b). The suit was properly commenced in admiralty. Const. Art. 3, § 2. The factual basis for jurisdiction is set forth in Article IV of the Libel (Tr. 4). On January 21, 1963, the District Court by Judgment Order in a final decision on the merits dismissed the Libel on Motion for Summary Judgment (Tr. 57-58). Libelants filed their Notice of Appeal on February 1, 1963 (Tr. 59). This Court has jurisdiction pursuant to 28 U.S.C.A. § 1291.

STATEMENT OF THE CASE

On June 17, 1957, while the SS MONMOUTH was being repaired by Albina Engine & Machine Works, Albina's employee John C. O'Brien was injured when scaffolding fell (Tr. 9). The death of John C. O'Brien from the injuries received occurred on May 15, 1961 (Tr. 9).

By the filing of a claim form dated May 24, 1961, (Carrier's Exh. 1) Hilda O'Brien sought widow's benefits authorized by the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C.A. § 909, claiming to be the widow of John C. O'Brien by virtue of a ceremonial marriage before a "Justice of Peace" on November 24, (year omitted) in Idaho.

The claim was controverted (Tr. 13, 14) and a formal hearing was held by J. J. O'Leary, Deputy Commissioner (Tr. 8). Hilda O'Brien never entered into a ceremonial marriage with the deceased John C. O'Brien (Tr. 20).

On July 2, 1929, John C. O'Brien married and thereafter lived with his wife until March 11, 1937 (Tr. 9). The marriage of July 2, 1929, was dissolved by divorce on April 10, 1943 (Tr. 10). Meanwhile, during November, 1938, John C. O'Brien and the claimant began living together in Middleton, Idaho (Tr. 9, 19). On September 12, 1942, the decedent and claimant moved to the State of Oregon (Tr. 10, 20, 21).

From 1943 until 1946 the decedent and claimant made annual vacation trips to Idaho to visit relatives (Tr. 10, 22, 23). On each occasion the visit would be between a week and two weeks (Tr. 10, 22).

Throughout the period of time that the decedent John C. O'Brien and claimant lived together they held themselves out to be and were known as husband and wife (Tr. 10, 22, 24, 30, 31).

At the hearing before the Deputy Commissioner the claimant attempted to prove that a marriage was created by virtue of having lived with John C. O'Brien as his wife. The Deputy Commissioner so ruled, finding that the annual visits to Idaho ". . . were sufficient to create or confirm the marital relationship . . ." existing from 1938 (Tr. 10). An award of death benefits to Hilda O'Brien as "surviving wife" was made (Tr. 11).

The questions of this appeal are raised by the appel-

lants' assignments of error directed to the District Court's Summary Judgment in favor of the respondents. Basically, the questions to be decided are:

1) Whether the public policy of Oregon prohibits entering into a common-law marriage by its residents on visits to Idaho;

2) Whether Idaho would permit visitors to enter into a common-law marriage, and if so, under what conditions;

3) If not prohibited by the public policy of the State of Oregon and permissible according to the law of Idaho, whether there is sufficient evidence in the record to permit a finding that John C. O'Brien and the claimant formed a marriage on visits to Idaho.

SPECIFICATIONS OF ERROR

The District Court erred in granting appellee J. J. O'Leary's Motion for Summary Judgment and dismissing the Libel for the reason that the District Court should have enjoined enforcement of the Compensation Order and Award of Death Benefits by appellee J. J. O'Leary dated August 14, 1962, on the grounds that:

1) There was no evidence upon which a determination could have been made that the appellee Hilda O'Brien was the lawful wife of decedent;

2) The appellee Hilda O'Brien and decedent could not and did not establish a marriage prior to decedent's 1943 divorce, as a marriage the relationship was void;

3) The decedent and appellee Hilda O'Brien could not and did not establish a marriage on visits to Idaho after the decedent's 1943 divorce;

4) The appellee Hilda O'Brien is not the surviving wife of the decedent and is not entitled to widow's benefits for her support pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

SUMMARY OF ARGUMENT

In order to qualify for widow's benefits under the Longshoremen's and Harbor Workers' Compensation Act the claimant must prove a lawful marriage. The formation and existence of marriage is a question of state not federal law. Having conceded the lack of a ceremonial marriage, the claimant must show a common-law marriage in order to qualify for widow's benefits. The claimant and deceased could not enter into a common-law marriage on visits to Idaho by virtue of the public policy of the State of Oregon. If not prohibited by Oregon law and permissible under Idaho law to enter into a common-law marriage on a visit to Idaho, there is no evidence in the record to sustain a finding of such a marriage on the part of the claimant.

ARGUMENT

This Court may review the record to see if the findings of the Deputy Commissioner are supported by evidence and correct application of law. See e.g. *U. S.* v. *Pan Am World Airways, Inc.,* 299 F.2d 74 (5th Cir., 1962).

A Lawful Marriage Is Necessary

After enactment of the Longshoremen's and Harbor Workers' Compensation Act in 1927 the courts decided that the terms "widow" (33 U.S.C.A. § 902(16)) and "surviving wife" (33 U.S.C.A. § 909) meant that a valid common-law or ceremonial marriage according to state law must have existed. *Bolin* v. *Marshall,* 76 F.2d 668 (9th Cir., 1935) cert. den. 296 U.S. 573, 56 S. Ct. 116, 80 L. Ed. 404; *Green* v. *Crowell,* 69 F.2d 762 (5th Cir. 1934) cert. den. 293 U.S. 554, 55 S. Ct. 88, 79 L. Ed. 656. Rights under other federal statutes dependent on marital status are also determined by reference to state domestic relations laws. In *DeSylva* v. *Ballentine,* 351 U.S. 570, 580, 76 S. Ct. 974, 980, 100 L. Ed. 1415, 1427 (1956) the court said: "The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state rather than federal law . . . there is no federal law of domestic relations . . ." In *Beebe* v. *Moormack Gulf Line, Inc.,* 59 F.2d 319 (5th Cir. 1932), a seaman's "widow" was held to have no action for wrongful death under the Jones Act, 46 U.S.C.A. § 688, where the alleged marriage was void under the laws of Louisiana.

In the instant case, the Deputy Commissioner impliedly acknowledged that the proper procedure required the application of state law. The acknowledgement is inherent in his finding that a marriage was "create(d) or confirm(ed)" on visits to Idaho (Tr. 10). Such a finding was undoubtedly premised on either or both of two propositions: 1) There were no facts in evi-

dence on which to predicate a finding that a common-law marriage was formed in Oregon; or 2) A common-law marriage could not be formed in Oregon but could be formed in Idaho. Appellants assume, arguendo for purposes of this appeal, that the Deputy Commissioner premised his findings on the proposition that a common-law marriage may not be formed in Oregon but may be in Idaho. Oregon does not permit parties to enter into common-law marriages. *Huard* v. *McTeigh,* 113 Or. 279, 232 Pac. 658 (1925). This court has applied the holding in *Huard* v. *McTeigh* and denied widow's benefits to a claimant under the Longshoremen's and Harbor Workers' Compensation Act. *Bolin* v. *Marshall, supra.* Idaho permits common-law marriages. § 32-201, Idaho Code.

As the claimant directly admitted before the Deputy Commissioner that she was not ceremonially married to John C. O'Brien, her only ground for claiming a marriage was to assert the formation of a common-law marriage on the basis of visits to Idaho. The Deputy Commissioner held that a marriage was created or confirmed on visits to Idaho.

At least to the extent that a man and woman were residents of the lex loci contractus at the time of the purported marriage, Oregon recognizes and follows the rule that a marriage valid where contracted is valid everywhere. *Boykin* v. *SIAC,* 224 Or. 76, 355 P.2d 724 (1960).

In this case, the parties began living together in Idaho in 1938 (Tr. 19). The relationship attained no legal status having any attributes of a marriage because John C. O'Brien was married to another woman at that time

(Tr. 9, 10). The relationship existing prior to 1943 could not ripen into a valid marriage in Oregon after the removal of the impediment in 1943 because it was void and the parties were living in Oregon. *Huard* v. *McTeigh, supra.* Therefore, the finding of the Deputy Commissioner that the parties ". . . entered into a common-law relationship . . ." (Tr. 9) is of no legal significance.

The ultimate question in this case is whether visits to Idaho in the context of the findings by the Deputy Commissioner confirmed or created a common-law marriage.

No marriage could have been formed in this case for two reasons. The first reason is that the public policy of the State of Oregon prohibits its residents from entering into a common-law marriage while visiting a neighboring state. Secondly, even if it were possible to marry on visits, Idaho would not permit such marriage by non-residents or would require objective evidence of a marriage contract.

Oregon's Public Policy Against Common-Law Marriages

The public policy of the State of Oregon was best put by the Supreme Court of Oregon when it stated: "In our opinion the doctrine of common-law marriages is contrary to public policy and public morals. It places a premium upon illicit cohabitation and offers encouragement to the harlot and the adventuress. We do not sanction loose marriages or easy divorces. . . . We are convinced that the conclusions herein reached are in keeping with the public policy of this state . . ." *Huard*

v. *McTeigh,* 113 Or. 279, 295, 296, 232 Pac. 658, 663 (1925). In ruling Oregon's marriage statutes mandatory, the Oregon Supreme Court rejected the holding of the Supreme Court of the United States in *Travers* v. *Reinhardt,* 205 U.S. 423, 51 L. Ed. 865 (1907) that marriage laws were only directory. 113 Or. at 291, 232 Pac. at 662. Should there be any doubt about the public policy of the State of Oregon, one has only to measure the aftermath of the decision in *Huard* v. *McTeigh,* supra. The legislature immediately passed an act legitimatizing the children of meretricious relationships by declaring the parents, under certain conditions, married. Oregon Laws 1925, Chapter 269. However, even this concession to protect the innocent was repealed after the only case interpreting the statute reached the Oregon Supreme Court. The case of *Wadsworth* v. *Brigham,* 125 Or. 428, 259 Pac. 299, 266 Pac. 875 (1928) was followed by repeal of the statute of 1925.[1] Oregon Laws 1929, Chapter 149.

This court has recognized and followed the policy against common-law marriages expressed by the Oregon Supreme Court. *Bolin* v. *Marshall, supra.*

One of the effects of strong public policy is to prohibit evasion of such policy by visitation to another jur-

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[1] Lest it be argued to this court that the repeal of the law of 1925 was not a further expression of policy against common-law marriages because its enactment cured all "defective marriages" it is pointed out that the repeal of the act without a savings clause may have effected a restoration of the status of all persons as it was before the 1925 statute, i.e., repeal meant the repealed statute never existed. *Fisk* v. *Leith,* 137 Or. 459, 299 Pac. 1013, 3 P.2d 535 (1931); *Drainage District No. 7* v. *Bernards,* 89 Or. 531 at 555, 174 Pac. 1167 (1918). In any event, the repeal is a legislative expression of policy against common-law marriages complementary to the legislative intent discussed in *Huard* v. *McTeigh, supra.*

isdiction. The effect may be illustrated by references to cases where marriages of parties in another state within six months of divorce in violation of the mandate of Oregon divorce laws are held void. See e.g. *Wright* v. *Kroeger,* 219 Or. 102, 345 P.2d 809 (1959). In the case of *Sturgis* v. *Sturgis,* 51 Or. 10, 16, 93 Pac. 696, 698 (1908) the court pointed out that where public policy prohibited certain marriages the prohibition could not be evaded by contracting marriage in another state.

Referring to the public policy of Oregon, the Washington Supreme Court has held as an alternative basis for a decision denying custody of children to the purported "husband" that Oregon residents could not enter into a common-law marriage in Idaho. *State* v. *Superior Court,* 23 Wash 2d 357, 161 P2d 188 (1945).

The recent decision in *Metropolitan Life Insurance Co.* v. *Chase,* 294 F.2d 500 (3rd Cir. 1961) illustrates the application of a state's public policy to facts very similar to those here. In the *Chase* opinion, Judge Maris explained that the public policy of New Jersey against common-law marriages could not be frustrated or evaded by journeying to a jurisdiction permitting the creation of common-law marriages.

In *Norcross* v. *Norcross,* 155 Mass. 374, 29 N.E. 506 (1892) the court held that residents of Massachusetts, a state not permitting common-law marriages, could not enter into a common-law marriage during a visit to New York, a state which at that time permitted such marriages.

In considering whether the law of the domicile or law

of the place of the contract prevails, Idaho recognizes that where a question of public policy is in issue, the law of the domicile controls. The Supreme Court of Idaho has stated: "A state may declare what marriages it will recognize as valid no matter where performed, and a claimed or purported marriage may be declared void when it is contrary to the positive law of the state of the domicile of the parties." *Duncan* v. *Jacobson Construction Co.,* 83 Idaho 254, 360 P.2d 987, 990 (1961). The foregoing expression by the Supreme Court of Idaho is recognition that marital status, as a rule of conflict of laws, is determined by the law of the state of the domicile. *Loughran* v. *Loughran,* 292 U.S. 216, 54 S. Ct. 684, 78 L. Ed 1219 (1934).

The importance of residence within the state of the common-law marriage at the time it was created is emphasized by the case of *Travers* v. *Reinhardt, supra.* In *Travers* the Supreme Court pointedly referred to the fact that the parties were *domiciled* in New Jersey at the time of the claimed marriage and that based upon domicile in a state such as New Jersey, which permits the formation of common-law marriage, a marriage was created.

In view of the public policy of the State of Oregon, the Deputy Commissioner and the District Court should have ruled the claimed marriage based on visits to Idaho void.

Non-Resident Common-Law Marriages in Idaho

Under what circumstances will common-law marriages by visitors be permitted? The problem in the cases considering the question seems to be whether the test of the creation of common-law marriages will be the same for non-residents as for residents. The distinction between residents and non-residents is apparently bottomed on queries such as: Will persons flying over the common-law state be deemed to have married? Will persons driving through the state be deemed married? Will persons staying overnight be deemed married? Because of the myriad possible fact situations regarding transients, courts considering the problem have imposed more stringent requirements for the creation of a non-resident common-law marriage. Appellants have been unable to find a case involving visitors to Idaho; however, there is no reason to believe that the Idaho Supreme Court, if it permitted common-law marriages by visitors, would adopt a test different from other courts which have considered the problem.

In *Marek* v. *Flemming,* 192 F. Supp. 528 (S.D. Tex. 1961) the plaintiff claimed to have entered into a common-law marriage in Texas by virtue of a week's visit in 1955 with friends in Texas during which she was introduced to friends and relations by the deceased "husband" as his wife. In denying benefits to the plaintiff, the District Court held that a visit to Texas was insufficient to establish a marriage. The Texas case relied upon by the District Court was *Kelly* v. *Consolidated Underwriters,* 300 S.W. 981, afd. 15 S.W.2d 229 (1929).

This Court has had occasion to consider the effect of a visit to Texas from California in the case of *Tatum* v. *Tatum,* 241 F.2d 401 (9th Cir. 1957). In the *Tatum* case, the proceeds of a policy of insurance under the Federal Employees' Group Life Insurance Act were denied to the "wife" because visits to Texas without a specific agreement of marriage did not result in the formation of a common-law marriage.

The visits of Nebraska residents to Colorado have been held not to result in a common-law marriage. *Binger* v. *Binger,* 158 Neb. 444, 63 N.W.2d 784 (1954). The court's syllabus, inter alia, states that a mere holding out as husband and wife while temporarily in a common-law marriage state is insufficient; there must be an intention or agreement of contracting a marriage.

Applying the holdings of the *Marek, Tatum* and *Binger* cases to this case, it is apparent that the claimant is not the widow of John C. O'Brien. The claimant did not testify that she agreed to be the wife of John C. O'Brien while they were visiting Idaho. As a matter of fact, her testimony shows there never was any agreement. Her testimony in this regard was that when she and the deceased began living together in 1938, "we just agreed that we were going to live together, and we did." (Tr. 20). "Q. At the time that you started living with him, Mrs. O'Brien, did you have any discussion regarding marriage? A. No." (Tr. 38). Coupling this testimony with the claim form (Carrier's Exhibit 1) asserting a ceremonial marriage, it is apparent that the parties never made an agreement to be married either before or after

the decedent's divorce or in or out of Idaho. Significantly, the Deputy Commissioner failed to find a marriage agreement (Tr. 9, 10); he did find a "common-law relationship" (Tr. 9) and a holding out as husband and wife (Tr. 10). He also found that the parties were known as husband and wife (Tr. 10). The Deputy Commissioner correctly made no finding of an agreement of marriage because where all the evidence has been presented by direct testimony, presumptions or inferences, which might otherwise have been applicable, have no place in the proceedings. *Del Vecchio* v. *Bowers,* 296 U.S. 280, 286, 56 S. Ct. 190, 80 L. Ed. 229, 233 (1935); *John W. McGrath Corporation* v. *Hughes,* 264 F.2d 314, 317 (2nd Cir. 1959); *French* v. *SIAC,* 156 Or. 443, 68 P.2d 466 (1937). Therefore, assuming arguendo the possibility of a common-law marriage by visitors to Idaho, there is no evidence in this case satisfying the requirements of express intention and agreement of marriage while in Idaho.

There is no indication in the decisions of the Idaho Supreme Court to indicate that visitors could enter into a common-law marriage while in Idaho in any event. Examination of Idaho cases leads one to the conclusion that the policy of the state generally tends toward the recognition of marriage of residents as opposed to labeling a relationship meretricious. See e.g. *Foster* v. *Diehl Lumber Company,* 77 Idaho 26, 287 P.2d 282 (1955); *Mauldin* v. *Sunshine Mining Co.,* 61 Idaho 9, 97 P.2d 608 (1940). However, visitors to Idaho cannot say that they have cohabited together in Idaho. In the *Mauldin* case the court said in finding a common-law marriage that the

parties "cohabited" as husband and wife. 61 Idaho at 20, 97 P.2d 608 at 612. Visitors do not establish a dwelling or residence at the place visited. There is no establishment of a marital habitation. Although considering actions of the parties themselves after a valid marriage, the case of *Thompson* v. *Lawson,* 347 U.S. 334, 74 S. Ct. 555, 98 L. Ed. 733 (1954) seems to express the point most succinctly in requiring a "conjugal nexus" as a basis for an award of widow's benefits under the provisions of 33 U.S.C.A. § 902 (16). Here the claimant and John C. O'Brien established no "conjugal nexus" or cohabitation in Idaho or with Idaho while visiting there; there would be no reason for Idaho to apply the policy favoring marriage as expressed in the cases construing the Idaho Code § 32-201.

CONCLUSION

There is no legal or factual basis for any conclusion that the claimant in this case was married to John C. O'Brien. The District Court erred in granting the Motion for Summary Judgment and refusing to enjoin enforcement of the compensation order. There is no evidence in the record in this case showing an agreement on the part of the claimant and John C. O'Brien to enter into a common-law marriage while on visits to Idaho nor does it appear as a matter of law that Idaho would permit such non-residents to enter into a common-law marriage in that state in any event. Furthermore, and of first magnitude, this court should follow the public policy of Oregon against common-law marriages of its resi-

dents because such a decision ". . . will best foster a higher and greater reverence for the marriage relation, which, in fact, is the very foundation upon which our government rests." *Huard* v. *McTeigh,* 113 Or. 279, 296, 232 Pac. 658, 663 (1925).

Respectfully Submitted,

GRAY FREDERICKSON & HEATH,
LLOYD W. WEISENSEE,
Proctors for Appellants.

APPENDIX OF EXHIBITS

Exhibit	Identified	Offered	Received
Claimants 1	25	25	25
Claimants 2	25	25	25
Claimants 3	25	25	25
Claimants 4	25	27	28
Claimants 5	25	27	28
Carriers 1	45	45	45

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

LLOYD W. WEISENSEE,
of Proctors for Appellants.